

MANDATE

14-4113-cv

Hepler v. Abercrombie & Fitch Co.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 22nd day of June, two thousand fifteen.

5
6 PRESENT: DENNIS JACOBS,
7 ROSEMARY S. POOLER,
8 PETER W. HALL,
9 Circuit Judges.

10
11 - - - - -X
12 VERONIQUE HEPLER, individually and on
13 behalf of all others similarly
14 situated, DOMINIQUE MARCEAU, HILLARY
15 GIBBS, SHURIKA ROBERTS-CRAWFORD, REED
16 HOFFMAN, CYNTHIA CHAN, CAITLYN
17 ANGELIDIS, PATRICK O'CONNELL, HOLLY
18 ADRIAANSEN, KATHERINE BLAU, JENNY
19 SAM,

20 Plaintiffs-Appellants,

21
22 -v.-

14-4113-cv

23
24 ABERCROMBIE & FITCH CO., ABERCROMBIE &
25 FITCH STORES, INC.,

Defendants-Appellees.*

FOR APPELLANTS:

SETE R. LESSER (Fran L. Rudich,
Klafter Olsen & Lesser LLP, Rye
Brook, New York, Bradley L.
Berger, Berger Attorney P.C.,
New York, New York, on the
brief), Klafter Olsen & Lesser
LLP, Rye Brook, New York.

FOR APPELLEES:

DAREN S. GARCIA (Mark A. Kneuve,
Michael J. Ball & Natalie M.
McLaughlin, on the brief),
Vorys, Sater, Seymour and Pease
LLP, Columbus, Ohio.

Appeal from a judgment of the United States District
Court for the Eastern District of New York (Wexler, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED
AND DECREED** that the judgment of the district court be
VACATED and that this matter be **REMANDED**.

Plaintiffs appeal from the judgment of the United
States District Court for the Eastern District of New York
(Wexler, J.), dismissing as moot their claims against
Abercrombie & Fitch Co. and Abercrombie & Fitch Stores, Inc.
(collectively, "Abercrombie"). We assume the parties'
familiarity with the underlying facts, the procedural
history, and the issues presented for review.

On appeal from a judgment of dismissal for lack of
subject matter jurisdiction, we review factual findings for
clear error and legal conclusions de novo. Makarova v.
United States, 201 F.3d 110, 113 (2d Cir. 2000).

1. The following analysis applies to offers of
judgment:¹

The Clerk of Court is respectfully directed to
amend the official caption in this case to conform with the
caption above.

¹ The offer need not comply with the requirements of
Federal Rule of Civil Procedure 68. Doyle v. Midland Credit

(a) If the offer tenders less than complete relief, the plaintiff is free to accept or not. If such an offer is accepted, the court must enter judgment accordingly and terminate the case; if such an offer is not accepted, the case proceeds as usual. Tanasi v. New Alliance Bank, --- F.3d ---, 2015 WL 2251472 (2d Cir. 2015). Under certain circumstances, an unaccepted offer may shift costs to the offeree. See Fed. R. Civ. P. 68(d).

(b) If the offer tenders complete relief, the court should (absent additional procedural complications) enter judgment pursuant to the terms of that offer, with or without the plaintiff's consent. McCauley v. Trans Union, L.L.C., 402 F.3d 340, 341 (2d Cir. 2005); Cabala v. Crowley, 736 F.3d 226, 228 (2d Cir. 2013) (per curiam); accord Tanasi, slip op. at 12. A defendant offering judgment for complete relief is, in essence, submitting to the entry of default judgment. Abrams v. Interco Inc., 719 F.2d 23, 32 (2d Cir. 1983) (Friendly, J.). Just as a defendant may end the litigation by allowing default judgment, a defendant may always end the litigation by offering judgment for all the relief that is sought. Id.; McCauley, 402 F.3d at 342.

We have described an offer of judgment for complete relief as "mooting" the case. However, the offer by itself does not moot anything, Tanasi, slip op. at 11-12, since an offer cannot bind the defendant to provide relief, McCauley, 402 F.3d at 342. It is the entry of judgment pursuant to that offer that "moots" the case. Tanasi, slip op. at 11-12; McCauley, 402 F.3d at 342. Mootness, in the constitutional sense, would require dismissal for lack of subject matter jurisdiction. An unaccepted offer of judgment, however, does not impair subject matter jurisdiction: the court retains jurisdiction to either enter judgment in favor of the plaintiff (if the offer tenders complete relief) or allow the case to proceed (if the offer does not).

2. In light of the foregoing, the district court erred by dismissing the case for lack of subject matter jurisdiction based on Abercrombie's unaccepted offers of

Mgmt., Inc., 722 F.3d 78, 79 (2d Cir. 2013) (per curiam). It must, however, be an offer of judgment, not simply an offer of settlement. Cabala v. Crowley, 736 F.3d 226, 228-29 (2d Cir. 2013) (per curiam).

1 judgment to Hepler and Marceau. Accordingly, we vacate and
2 remand for further proceedings consistent with this summary
3 order.

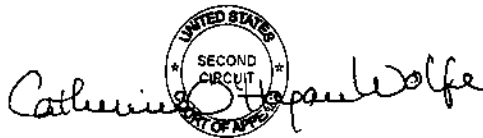
4
5 Abercrombie's offers of judgment have, by now, lapsed.
6 Should Abercrombie renew those offers on remand, the court
7 should consider the following:

8
9 (a) We have previously addressed the appropriate course
10 of action when a court rules that certain relief is
11 unavailable, and the defendant subsequently makes an offer
12 of judgment for the remaining relief. ABN Amro
13 Verzekeringen BV v. Geologistics Americas, Inc., 485 F.3d
14 85, 92-93, 95 (2d Cir. 2007); Abrams, 719 F.2d at 32.

15
16 (b) As to the state law claims, the complaint alleges
17 not only supplemental jurisdiction, 28 U.S.C. § 1367, but
18 also original federal jurisdiction under the Class Action
19 Fairness Act, 28 U.S.C. § 1332(d).

20
21 For the foregoing reasons, and finding no merit in
22 Abercrombie's other arguments, we hereby **VACATE** the judgment
23 of the district court and **REMAND** for further proceedings
24 consistent with this summary order.

25
26 FOR THE COURT:
27 CATHERINE O'HAGAN WOLFE, CLERK

28
29
30
31


A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

